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OFFICE OF PETITIONS

In re Application of :
Jain et al. :
Application Number: 10/603995 :
Filing Date: 06/26/2003 :
Attorney Docket Number: 10.0444 :

ON PETITION

This is a decision on the petition filed under 37 CFR 1.137(a) on October 24, 2008, which is treated as a petition to withdraw the holding of abandonment of the above-identified application.

The petition is **GRANTED**.

The application was held abandoned on October 1, 2008, for failure to timely respond to the Notice of Allowance and Fee(s) Due mailed on June 30, 2008, which set a three (3) month statutory period for reply. Notice of Abandonment was mailed on October 23, 2008.

Petitioner asserts that the Notice of Allowance and Fee(s) Due mailed on June 30, 2008, was never received.

In support of the allegation that the Notice of Allowance and Fee(s) Due mailed on June 30, 2008 was never received, petitioners have submitted a copy of counsel's docket record and mail log, and have provided a statement by registered patent practitioner Lawrence A. Baratta, Jr., stating that practitioner's search of the file jacket indicates that the Notice of Allowance was not received. The statement additionally states that practitioner reviewed the incoming mail log from June 30, 2008 through July 15, 2008, and it did not include a Notice of Allowance for the present case. The petition further states that the IP Master docketing system is used. A copy of the mail log and docket record have been referenced in the petition and are included herewith.

A review of the record indicates no irregularity in the mailing of the Notice of Allowance and Fee(s) Due mailed on June 30,

2008, and in the absence of any irregularity in the mailing, there is a strong presumption that the Notice of Allowance and Fee(s) Due mailed on June 30, 2008, was properly mailed to the address of record. This presumption may be overcome by a showing that the Notice of Allowance and Fee(s) Due mailed on June 30, 2008 were not in fact received.

MPEP 711.03(c) states, in pertinent part:

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The docket record filed with the petition appears to be a master docket record, and is being so construed. Petitioners **must** inform the Office if this is an incorrect interpretation.


Accordingly, there was no abandonment in fact. The Notice of Abandonment is hereby vacated and the holding of abandonment withdrawn.

As the holding of abandonment has been withdrawn, the petition under 37 CFR 1.137(a) is unnecessary and will be dismissed as moot. The petition fee will be credited to counsel's deposit account.

The petition is **GRANTED**.

As the issue fee required by the Notice of Allowance and Fee(s) Due mailed on June 30, 2008, has been paid with the subject petition, it is unnecessary to remail the Notice of Allowance and Fee(s) Due. Rather, the application is referred to the Office of Data Management for processing into a patent.

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3231.


Douglas I. Wood
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Office of Petitions